Yung Chen Wood Industry Sdn Bhd v Scott & English (M) Sdn Bhd

HIGH COURT (SANDAKAN) — SUIT NO S22–34 OF 2000
LINTON ALBERT J
6 JULY 2006

Sale of Goods — Conditions and warranties — Goods not according to specification — Plaintiff expected two generators to generate 2000 kilowatts — Each unit generated only around 600 kilowatts — Whether plaintiff should have known that the power generated was only 70% of the rating according to the manufacturer's specifications catalogue and worldwide warranty

The plaintiff was operating a factory which manufactured plywood and block board. The existing generator sets in the factory could not produce the 4000 kilowatts of electricity to run it and so the plaintiff purchased an additional two units of generator sets from the defendant. Each unit was supposed to generate a power rating of 1000 kilowatts which meant that the plaintiff expected the two units to generate 2000 kilowatts to meet the electricity requirement of its factory. The two generator sets supplied by the defendant were installed at the plaintiff's factory but despite numerous troubleshooting exercises by the defendant's serviceman on the two generator sets the power generated by each unit was around 600 kilowatts because if operated at a rating of up to 650 kilowatts the exhaust manifold of each of the generator sets would experience extreme heat and glow red hot. The plaintiff commenced this action against the defendant for breach of contract and breach of condition and warranty as to the performance capacity, specification, fitness and suitability of the two generator sets. The defendant contended that it had only warranted a power rating of 700 kilowatts for each unit as the plaintiff ought to have known that each set should only generate 70% of the prime power rating.

Held:

(1) There was nothing to suggest that the plaintiff knew or was told that the word 'rating' appearing in the sales contract and the consignment invoices meant 'prime power rating' nor could the plaintiff be expected to know or ought to have known that the power generated was only 70% of the rating. There is also no basis for the defendant to rely on the manufacturer's specifications catalogue and worldwide warranty stating that the average load factor was 70% of the prime power rating. Firstly, there was no reference whatsoever to 'prime power rating' in either the sales contract or the consignment invoices. Secondly, there was not a shred of evidence to show that the plaintiff was at anytime given a copy of the specifications catalogue and worldwide warranty nor was the plaintiff shown to have been supplied with such a document in connection

with its four existing units of generator sets. Of utmost importance is the fact that it was not the defendant's case that the sale of the two units of generator sets was subject to that document (see para 5). A

(2) On the totality of the evidence, the plaintiff has, on a balance of probabilities established that the defendant was in breach of its promise that the two units of generators would produce a total of 2000 kilowatts and therefore liable to the damages occasioned by the breach. The plaintiff incurred fuel consumption and other installation and wiring costs in having to set up extra generator sets to meet the shortfall in electricity required by the defendant. The plaintiffs own mechanic cum wireman witnessed the woeful inability of the two generator sets to produce anywhere near the promised 2000 kilowatts of electricity during those occasions when the defendant's men had come to service them as shown by the field service reports produced (see para 7). B C

[Bahasa Malaysia summary

D

Plaintif mengendalikan kilang membuat papan lapis dan papan cantum. Penjana yang sedia ada di kilang tersebut tidak dapat mengeluarkan 4000 kilowatts elektrik untuk mengendalikan kilangnya dan dengan itu plaintif telah membeli dua unit penjana tambahan daripada defendan. Setiap unit sepatutnya menjanakan kuasa kadar 1000 kilowatt dengan itu plaintif menjangka kedua-dua unit dapat menjanakan 2000 kilowatt untuk memenuhi keperluan elektrik kilangnya. Kedua-dua set penjana yang dibekalkan oleh defendan dipasang di kilang plaintif namun selepas beberapa percubaan menyelesaikan masalah oleh anggota-anggota servis defendan ke atas kedua-dua penjana tersebut, kuasa yang dijanakan oleh setiap unit adalah lebih kurang 600 kilowatt oleh kerana sekiranya dikendalikan pada kadar sehingga 650 kilowatt berbagai-bagai ekzos, setiap satu penjana akan mengalami kepanasan yang keterlaluan dan berpijar merah kepanasan. Plaintif memulakan tindakan ini terhadap defendan untuk kemungkiran kontrak dan kemungkiran syarat dan waranti yang berkait dengan muatan pencapaiannya, spesifikasi, kualiti dan kesesuaian kedua-dua penjana tersebut. Defendan menyatakan bahawa ia hanya menjamin kuasa pada kadar 700 kilowatt untuk setiap unit dan plaintif sepatutnya mengetahui bahawa setiap set hanya dapat menjanakan 70% kuasa kadar utama. E F G

Diputuskan:

(1) Tiada apa-apa yang mencadangkan bahawa plaintif tahu atau telah diberitahu bahawa 'kadar' yang dinyatakan dalam kontrak jualan dan invois konsainan bermaksud 'kuasa kadar utama' dan plaintif juga tidak menjangka bahawa ia tahu atau sepatutnya tahu bahawa kuasa yang dapat dijanakan hanya pada kadar 70%. Tiada asas juga untuk defendan bergantung kepada spesifikasi katalog dan waranti sedunia pengilang yang menyatakan bahawa faktor muatan biasa ialah 70% kuasa kadar utama. Pertamanya, tiada sebarang rujukan langsung kepada 'kuasa kadar utama' di dalam kontrak jualan ataupun invois konsainan. Keduanya, tiada sebarang bukti langsung untuk menunjukkan plaintif telah pada sebarang masa diberikan salinan spesifikasi katalog dan waranti sedunia ataupun dibuktikan bahawa plaintif telah H I

dibekalkan dengan dokumen tersebut berhubungan dengan keempat-empat unit janakuasa yang sedia ada. Yang paling utama ialah fakta bahawa ia bukan kes defendan bahawa penjualan kedua-dua unit set janakuasa adalah berdasarkan kepada dokumen tersebut (lihat perenggan 5).

(2) Berdasarkan keseluruhan keterangan, plaintif telah menunjukkan di atas imbangan kebarangkalian bahawa defendan telah memungkiri perjanjiannya untuk membekalkan dua unit janakuasa yang dapat membekalkan jumlah 2000 kilowatt dan dengan itu bertanggungan untuk ganti rugi yang disebabkan oleh kemungkiran tersebut. Plaintif telah menanggung kegunaan bahan api dan pemasangan yang lain dan kos pemasangan wayar dalam menyediakan janakuasa tambahan untuk mencapai kurangan bekalan elektrik untuk memenuhi kehendak defendan. Mekanik serta pemasang dawai plaintif sendiri menyaksikan ketidakupayaan kedua-dua janakuasa mengeluarkan 2000 kilowatt elektrik seperti yang dijanjikan apabila wakil-wakil defendan hadir untuk memberikan perkhidmatan seperti yang digambarkan di dalam repot servis lapangan yang dikemukakan itu (lihat perenggan 7).]

Notes

For a case on goods not according to specification, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 690.

Cases referred to

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (folld)
Nanyang Union Sdn Bhd v Gloveline Industries (M) Sdn Bhd [2006] 2 MLJ 485 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (folld)

Edwin Tsen (Catherine Voo with him) (Tan Pang Tsen) for the plaintiff.
Chin Vun Chung (Koh Hiew & Partners) for the defendant.

Linton Albert J:

[1] The plaintiff was operating a factory which manufactured plywood and block board. The existing generator sets in the factory could not produce the 4000 kilowatts of electricity to run it and so the plaintiff purchased an additional two units of generator sets from the defendant. Each unit was supposed to generate a power rating of 1000 kilowatts which meant that the plaintiff expected the two units to generate 2000 kilowatts to meet the electricity requirement: of its factory. The defendant supplied two units of generator sets to the plaintiff each under a separate consignment invoice. The two generator sets were installed at the plaintiff's factory but despite numerous troubleshooting exercises by the defendant's serviceman on the two generator sets the power generated by each unit was around 600 kilowatts because operated at a rating of up to 650 kilowatts the exhaust manifold of each of the generator sets would experience extreme heat and glow red hot. The plaintiff commenced this action against the defendant for breach of contract and breach of condition and warranty as to the performance capacity, specification, fitness and suitability of the two generator sets.

[2] The defendant, in its statement of defence denied it had promised or warranted that the generator sets could each produce a rating of 1000 kilowatts as alleged; it only warranted that the generator sets could each produce a prime rating of 1000 kilowatts and that the plaintiff ought to have known that each set should only generate 70% of the prime power rating. In short, the defendant contended that it had only warranted a power rating of 700 kilowatts for each unit. The defendant therefore denied that it was liable to the plaintiff. The trial was confined to the issue of liability.

[3] A director of the plaintiff, Wang Lai Ping said that the plaintiff had decided to purchase two units of generator sets which would produce a total of 2000 kilowatts of electricity. According to him, one Andy Wong a representative of the defendant had represented to him that each of the two units of generator sets sold by the defendant under a sales contract between the plaintiff and the defendant dated 22 May 1997 would produce 1000 kilowatts of electricity. The description of the two generator sets was stated in the sales contract as follows:

> Two (2) units NEW Cummins Diesel Generator set (ONAN 1120DFLC) model KTA50GC3, 1000KW/1250KVA c/w Stamford alternator, 3 phase, 4 wires, 415V, 1500 RPM, 50 Hz and 0.8 p. flagging c/w following std accessories.

[4] Each of the consignment invoices which accompanied the delivery of the two units of generator sets contained this identical description:

> CUMMINS ONAN DIESEL ENGINE RATING:1000KW/1250KVA

[5] Andy Wong whose real name was Wong Yeu @ Andrew Wong, the defendant's branch manager denied he had represented to Wong Lai Ping that each of the two units of generator would produce 1000 kilowatts- However Wong Chin Chong, the defendant's area manager at the material time agreed that a verbal assurance to that effect could possibly have been given. I am satisfied that the plaintiff has established this aspect of its case because the description given in the sales contract and the consignment invoices supported Wang Lai Ping's testimony. He did, in addition, testify that he would have considered purchasing a third unit had it been made not known to him that the average load factor for each of the two units was only 700 kilowatts. The defendant's plea that the plaintiff knew or ought to have known that this was the case from its existing four units of generator sets, two of which were identical to the two units in the instant case is devoid of merit. Even if, as pleaded by the defendant the plaintiff would have known that out of the total prime power rating of 3000 kilowatts for its existing four units of generator sets the combined power produced by them was only 70% of that, which amounted to 2100 kilowatts, the 1400 kilowatts the two units could only produce, based on the defendant's calculation, would still not add up to the plaintiff's requirement of 4000 kilowatts. The inevitable inference is that the plaintiff required the two units to produce 2000 kilowatts to make up for its total requirement of 4000 kilowatts and must have relied on the defendant's promise that the two generator sets would produce 2000 kilowatts. There was nothing to suggest that the plaintiff knew or was told that the word 'rating' appearing in the sales contract and the consignment invoices meant 'prime power rating' nor could the plaintiff be expected to know or ought to have

known that the power generated was only 70% of the rating. I do not think there is any basis for the defendant to rely on the manufacturer's Specifications Catalogue and Worldwide Warranty stating that the average load factor was 70% of the prime power rating. Firstly, there was no reference whatsoever to 'prime power rating' in either the Sales Contract or the consignment invoices. Secondly, there was not a shred of evidence to show that the plaintiff was at anytime given a copy of the Specifications Catalogue and Worldwide Warranty nor was the plaintiff shown to have been supplied with such a document in connection with its four existing units of generator sets. Of utmost importance is the fact that it was not the defendant's case that the sale of the two units of generator sets was subject to that document. It is preposterous for Wong Chin Chong to suggest that like the sale and delivery of a car or air-conditioner which would invariably be accompanied by their operation manual and warranty card, the sale and delivery of the two generator sets would have included the Specifications Catalogue and Worldwide Warranty as part of the product. The concept of judicial notice would be taken to its illogical extreme if that proposition is to gain acceptance because a generator set is neither a car nor an air-conditioner.

[6] It is clear, from the evidence given by Lee Shu-Neng, the plaintiff's mechanic cum wireman, the field service reports produced by the defendant and the letters; from the plaintiff to the defendant complaining about the two generator sets that the electricity produced was well below the 2000 kilowatts the plaintiff had expected as warranted by the defendant. Indeed, it was the defendant's case that it could produce no more than a total of 1400 kilowatts. In the circumstances, I find it neither useful nor necessary to embark on a judicial investigation on the likely causes of the vibrations and visible signs of over heating exhibited by each of the two generator sets even when set at a power rating well below the 1000 power rating, nor should the perverted recollection of Yap Nyuk Choon and Patrick Adau both of whom were then the defendant's Workshop supervisors be dignified. The former tried to explain away the defects of the two generator sets expressed in the field service reports while the latter testified that the defects were due to the mis-installation of the two generator sets by the defendant or its contractor resulting in obstruction of air flow, in stark contrast to the absence of anything to that effect in the documents produced before the court and the woeful failure of the defendant to respond to the plaintiff's letters of complaint indicating that that was the cause of the defects. It is trite that what was stated or not stated in contemporaneous documents ought to be preferred to statements of witnesses made years after the event.

[7] On the totality of the evidence before me, I find that the plaintiff has, on a balance of probabilities established that the defendant was in breach of its promise that the two units of generators would produce a total of 2000 kilowatts and therefore liable to the damages occasioned by the breach. The plaintiff incurred fuel consumption and other installation and wiring costs in having to set up extra generator sets to meet the shortfall in electricity required by the defendant. The Court of Appeal case of *Nanyang Union Sdn Bhd v Gloveline Industries (M) Sdn Bhd* [2006] 2 MLJ 485, an authority cited by Edwin Tsen, learned Counsel for the plaintiff is illustrative. In that case, Nanyang Union Sdn Bhd (Nanyang) supplied to and for Gloveline Industries (M) Sdn Bhd (Gloveline) an examination glove plant

promising that the plant would produce 4,500 examination gloves per hour. Based on the testimony of a single non-expert witness who had himself on occasions saw that the plant had failed to produce 4,500 gloves per hour and the fact that the rate of rejection was high, the Court of Appeal concluded that Nanyang was liable to Gloveline and awarded damages against Nanyang. Similarly, in the instant case, the plaintiffs own mechanic cum wireman, Lee Shu Weng himself witnessed the woeful inability of the two generator sets to produce anywhere near the promised 2000 kilowatts of electricity during those occasions when the defendant's men had come to service them as shown by the field service reports produced.

[8] I shall now, before concluding turn to some of the issues raised in the respective written submissions. Chin Vun Chung, learned counsel for the defendant lamented the fact that the witness statements of the plaintiff's two witnesses were only made available at the commencement of the trial thus depriving him of the opportunity to properly prepare for their cross examination. Added to that was the potential element of surprise. I find these contentions, for want of a better phrase, neither here nor there because it was not suggested that their testimonies ought to be totally disregarded. In any event learned counsel did not at all take exception when the trial commenced by way of witness statements and it is certainly not open for him to do so after the conclusion of the trial, as correctly pointed out by learned counsel for the plaintiff. Clearly, the contents of the witness statements were confined to matters raised in the pleadings and it is beyond me how in these circumstances the defendant could have been prejudiced because although the failure to cross-examine on material aspects of the plaintiff's case was glaring, it is not necessary to rely on the principle enunciated in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 to conclude that the plaintiff had on the evidence before the Court established its case on a balance of probabilities irrespective of the urgings of learned counsel for the plaintiff, relying on that case, that the defendant was deemed to have admitted matters which were not subjected to cross-examination by the defendant's counsel. I also find the defendant's reliance on the defence of innocent misrepresentation equally unsustainable because it was not pleaded. The statement of the law laid down by Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and reproduced with approval by Gunn Chit Tuan SCJ delivering the judgment of the Supreme Court in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 156 must be applied here:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[9] Finally, I do not think that the plaintiff is entitled to the reliefs sought in the statement of claim other than damages because they have been abandoned in learned counsel's opening statement where it was stated thus:

> The plaintiff will be dealing with the issue of liability only at this trial and damages to be assessed upon finding of issue of liability against the defendant.

[10] For the reasons and in the circumstances aforesaid, judgment is entered for the plaintiff with damages to be assessed by the deputy registrar and costs to be taxed unless agreed. Order accordingly.

Order accordingly.

Reported by Sally Kee